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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LISSETT MORENO,

Defendant and Appellant.

F063459

(Super. Ct. No. F11902700)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Lissett Moreno guilty of eight counts of sale, transfer, or conveyance of the personal identifying information of another in violation of Penal Code

section 530.5, subdivision (d)(2).<sup>1</sup> She was found guilty of four additional offenses, but this appeal relates only to the counts for selling personal identifying information.

Moreno sold the personal identifying information of five people in one transaction and, a few days later, sold the personal identifying information of three people in a second transaction. She was convicted of a separate count for each sale of a person's identifying information. On appeal, Moreno contends she should only be liable for two counts, based on the two transactions. Alternatively, she argues, under section 654, the punishment for six of the eight counts should be stayed because she committed only two nonviolent acts. Related to this alternative argument, Moreno also claims the trial court erred by imposing concurrent terms for two of the counts.

Finally, Moreno asserts that the abstract of judgment should be corrected to award her one additional day of conduct credit. The People agree that the abstract of judgment should be corrected but otherwise disagree with Moreno.

We hold that each sale of a specific person's personal identifying information is a violation of section 530.5, subdivision (d). We agree with the parties that the abstract of judgment must be corrected. In all other respects, we affirm the judgment.

### **FACTUAL AND PROCEDURAL HISTORIES**

The facts of this case are not in dispute. At the time of trial, Kasandra Samrech had been friends with Moreno for about four years. Samrech also was working with the Fresno Police Department as a paid confidential informant and had done so for about a year and a half. She has two convictions for misdemeanor identity theft and a conviction for receiving stolen property.

In March 2011, Samrech informed the police that Moreno had personal identifying information for sale. Detectives Brad Alcorn and Carey Phelps met with Samrech to set up a controlled buy of personal identifying information from Moreno with Samrech as the

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<sup>1</sup>Subsequent statutory references are to the Penal Code unless otherwise stated.

buyer. On March 10, 2011, the police gave Samrech cash for the controlled buy and she drove to Moreno's house. A man answered the door; Moreno was not there. Samrech called Moreno, who told her to leave the money (over \$100) with the man and he would give her an envelope. Samrech did as instructed and received an envelope from the man. Alcorn and Phelps—who were parked around the corner from Moreno's house—observed Samrech from their car, and Phelps videotaped the transaction.

Afterwards, Samrech drove to another location and gave the envelope to Alcorn and Phelps. It contained 20 to 30 pieces of paper, including “multiple [persons'] names and social security numbers and checking accounts and other identifying information.” The parties do not dispute that the envelope contained personal identifying information for Bobby Whitson, James and Virginia Hayes, Emilie Cales, and Delaine Johnson.

On March 16, 2011, the police conducted another controlled buy. Samrech met with Alcorn and Phelps; they equipped Samrech with an electronic listening device and gave her cash. She drove to Moreno's house, and this time she was at home. Samrech gave Moreno over \$200 in exchange for additional personal identifying information. Again, the transaction was observed and videotaped by the detectives. Samrech gave what she had purchased from Moreno to Alcorn and Phelps. It was “[a] brown manila envelope containing numerous pieces of paper containing people's names, social security numbers, date of birth, addresses.” The envelope contained personal identifying information for Sareang Nhim, James Butchert, and Whitson.

The police arranged additional controlled buys of other contraband from Moreno. On March 17, 2011, Samrech bought a “40” of methamphetamine, meaning \$40 worth, from Moreno. Five days later, Samrech bought a quarter ounce of methamphetamine for over \$250 from Moreno. Again, Phelps videotaped these transactions. The police had instructed Samrech to ask Moreno about buying a car. According to Samrech, Moreno indicated “she has her ways of getting cars” and later called and told Samrech she had a car for \$350. A few days later, Samrech met with Moreno in a shopping center parking

lot and bought a small compact car from her for \$350. The registered owner of the car was Enterprise Rent-a-Car. Both Enterprise and the person who last rented the car from Enterprise reported the car stolen. Finally, Samrech bought methamphetamine from Moreno on April 5, 2011.

Detective Alcorn arrested Moreno on May 12, 2011. In Moreno's purse, Alcorn found a glass pipe commonly used to smoke methamphetamine, some digital scales, and a personal check book not in her name.

In an amended information, the Fresno County District Attorney charged Moreno with 14 counts and alleged Moreno had served two prior prison terms (§ 667.5, subd. (b)) and had three prior convictions for transporting or selling drugs (Health & Saf. Code, § 11370.2, subd. (c)). The first eight counts were for the sale of personal identifying information in violation of section 530.5, subdivision (d)(2).<sup>2</sup> Counts 9, 10, and 13 alleged Moreno sold a controlled substance in violation of Health and Safety Code section 11379, subdivision (a). Count 11 alleged the unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a). Count 12 alleged Moreno received stolen property (the car) in violation of section 496d, subdivision (a). Count 14 alleged Moreno received stolen property (the check book) in violation of section 496, subdivision (a).

A jury trial began on August 23, 2011. The seven identified victims of identity theft all testified.<sup>3</sup> The jury began deliberations on August 30, 2011, and reached a

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<sup>2</sup>The counts corresponded to the victims as follows: count 1, Whitson; count 2, James Hayes; count 3, Virginia Hayes; count 4, Cales; count 5, Johnson; count 6, Nhim; count 7, Whitson; and count 8, Butchert. Counts 1 through 5 involve the March 10, 2011, sale, and counts 6 through 8 involve the March 16, 2011, sale. Regarding the two counts for the victim Whitson, Moreno does not dispute that the sale of a specific person's personal identifying information on two separate occasions is two crimes. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455.)

<sup>3</sup>The eight counts relate to the seven victims whom the police were able to contact, but it appears Moreno may have sold to Samrech the personal identifying information of

verdict the next day. Moreno was found not guilty of counts 11 and 14 and guilty of the remaining counts. After the jury was discharged, Moreno admitted the enhancement allegations of two prior prison terms and three prior convictions for drug sales.

On September 29, 2011, the trial court sentenced Moreno to a prison term of 19 years. The court treated count 9 as the principal term and imposed the upper term of four years, plus enhancements of nine years for the three prior drug crimes and two years for the two prior prison terms for a total term of 15 years. The court imposed the upper term of four years for counts 10 and 13, and three years for count 12, to be served concurrently. For each of counts 1, 2, 4, 5, 6, and 8, the court imposed eight months (one-third of the middle term of two years), to run consecutively, for a total of four additional years. The court imposed the upper term of three years for each of counts 3 and 7, to be served concurrently. The court also imposed various fines. Moreno received 141 days' credit for actual time spent in local custody and 140 days' conduct credit.

## **DISCUSSION**

### ***I. Multiple convictions***

Section 530.5 makes it a crime to use the personal identifying information of another for any unlawful purpose, or to acquire, retain, sell, transfer, or convey the personal identifying information of another with the intent to defraud.<sup>4</sup> (§ 530.5,

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many others. Detective Phelps testified, "There were a few people I was able to confirm .... I think we confirmed eight people out of maybe 150."

<sup>4</sup>Section 530.55, subdivision (b), defines "personal identifying information" as "any name, address, telephone number, health insurance number, taxpayer identification number, school identification number, state or federal driver's license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code,

subds. (a), (c), & (d).) Section 530.5 is commonly referred to as an identity theft statute (*People v. Barba* (2012) 211 Cal.App.4th 214, 226; *People v. Valenzuela* (2012) 205 Cal.App.4th 800, 806 (*Valenzuela*)), and offenses under the statute are referred to as identity theft (e.g., *In re Rolando S.* (2011) 197 Cal.App.4th 936, 939). In this case, for example, Samrech told the police she could get “I.D. theft stuff” and Alcorn referred to “[i]identity theft profiles”—both referring to personal identifying information. Alcorn explained that an identity theft profile is information about a victim gathered by an identity thief, which can be used to apply for credit cards, among other things.

Moreno was convicted of eight counts under section 530.5, subdivision (d)(2). Subdivision (d) of section 530.5 provides:

“(1) Every person who, with the intent to defraud, sells, transfers, or conveys the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

“(2) Every person who, with actual knowledge that the personal identifying information, as defined in subdivision (b) of Section 530.55, of a specific person will be used to commit a violation of subdivision (a), sells, transfers, or conveys that same personal identifying information is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment pursuant to subdivision (h) of Section 1170, or by both a fine and imprisonment.”

Moreno contends she can only be convicted once for each time she sold personal identifying information to Samrech even though each transaction involved multiple victims’ information. She contends that a “plain reading of the statute” and the undisputed evidence demonstrates that only two sales were consummated. We disagree.

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telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person, or an equivalent form of identification.”

First, we reject Moreno’s claim that a plain reading of section 530.5, subdivision (d)(2), compels the conclusion that only two crimes were committed. In interpreting a statute, our objective is “to ascertain and effectuate legislative intent,” looking “first to the words themselves.” (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) Moreno focuses on the word “sells,” and argues that a violation of subdivision (d)(2) occurs when a defendant sells “all that is bargained for in the exchange, whether it is one or more identity profiles.” This argument, however, requires us to ignore the statutory language referring to the individual victim. Subdivision (d)(2) refers to the personal identifying information of “a specific person.” A violation of section 530.5, subdivision (d)(2), occurs whenever a person sells, transfers, or conveys “that same personal identifying information” (that is, information of “a specific person”) with the requisite intent. We read this language to mean that the sale of each specific person’s personal identifying information is a violation of the statute. It follows that, if the information for multiple victims is sold at one time, then multiple violations have occurred. Moreno’s reading of the statute, on the other hand, gives no significance to the phrase “a specific person.” This contravenes the “settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.” (*People v. Woodhead, supra*, at p. 1010.)

Further, the legislative history of the statute supports Moreno’s separate conviction for each identity theft victim. (See *People v. Woodhead, supra*, 43 Cal.3d at p. 1008 [where statutory language is susceptible to more than one interpretation, court looks to extrinsic aids, including legislative history].) In *Valenzuela, supra*, 205 Cal.App.4th 800, the Court of Appeal examined the legislative history of the identity theft statute and rejected an argument very similar to Moreno’s. In that case, the defendant was convicted of three counts of possession of personal identifying information with intent to defraud in violation of subdivision (c)(1) of section 530.5. Like Moreno, the *Valenzuela* defendant

argued that his possession of information relating to three victims was only one offense. He relied on cases that held possession of multiple items at one time constitutes a single offense. (*Valenzuela, supra*, at p. 804.)

The *Valenzuela* court noted that the author of a bill amending an earlier version of section 530.5 “explained the amendment was needed to protect the victims of identity fraud, who cannot protect themselves from fraudulent use of their identifying information once it is in the possession of another, because they cannot easily change their name, date of birth, Social Security number, or address.” (*Valenzuela, supra*, 205 Cal.App.4th at p. 807, citing Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1254 (2001-2002 Reg. Sess.) as amended Mar. 11, 2002.) The author of a later bill amending section 530.5, Assembly Bill No. 2886, explained the amendment was needed because “under the then current law, identity thieves usually receive just ‘a slap on the wrist for all the damage they cause in the lives of these victims,’ and ... the purpose of the bill was to ‘give local law enforcement and the courts the legal authority and tools necessary to aid victims.’” (*Valenzuela, supra*, at p. 807, citing Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2886 (2005-2006 Reg. Sess.) as amended Aug. 28, 2006.) In analyzing Assembly Bill No. 2886, the Senate Committee on Public Safety described the unique nature of identity theft crimes:

“‘[T]he crimes of identity theft, and complementary statutory provisions, were created because the harm suffered by identity theft victims went well beyond the actual property obtained through the misuse of the person’s identity. Identity theft victims’ lives are often severely disrupted. For example, where a thief used the victim’s identity to buy a coat on credit, the victim may not be liable for the actual cost of the coat. However, if the victim was initially unaware of the illicit transaction, the damage to the person’s credit may be very difficult to repair. The perpetrator could commit other crimes by using the victim’s identity, causing great harm to the victim. Thus, identity theft in the electronic age is an essentially unique crime, not simply a form of grand theft.’” (*Valenzuela, supra*, 205 Cal.App.4th at p. 808, quoting Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2886 (2005-2006 Reg. Sess.) as amended May 26, 2006.)



The committee further noted that, while theft is generally a discrete event, identity theft ““creates ripples of harm to the victim that flow from the initial misappropriation.”” (*Valenzuela, supra*, 205 Cal.App.4th at p. 808, quoting Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2886 (2005-2006 Reg. Sess.) as amended May 26, 2006.)

The *Valenzuela* court concluded:

“As this legislative history makes clear, the retention of personal identifying information of another is not a possession crime, but is a *unique* theft crime. Therefore, cases holding that, with regard to possession crimes, the possession of multiple items is a single offense even when there are multiple victims are not applicable to section 530.5, subdivision (c)(1). Instead, the retention of personal identifying information of multiple victims constitutes multiple identity theft offenses.” (*Valenzuela, supra*, 205 Cal.App.4th at p. 808, italics added.)

We agree with the *Valenzuela* court’s reasoning. The legislative history of section 530.5 demonstrates the Legislature’s concern for the individual victims of identity theft and its recognition that identity theft may cause greater, more personal, and longer-lasting harm than a run-of-the-mill property crime. This history supports the interpretation that the sale of each victim’s personal identifying information is a violation of section 530.5, subdivision (d).

Given the unique nature of identity theft, Moreno’s reliance on cases involving general property theft is misplaced. For example, she cites *People v. Smith* (1945) 26 Cal.2d 854, 859, in which the court held that receiving stolen goods in a single transaction where the items had been stolen from multiple victims constituted only one offense. The court reasoned: “The gist of the offense is the purchase or receipt of the stolen goods with guilty knowledge but the particular ownership of the goods is not an element of the crime. Neither the legal nor moral character of the act is affected in any way by the fact that the stolen property may have belonged to several persons rather than to a single person.” (*Ibid.*) Here, in contrast, the gist of Moreno’s offense is the sale of a *specific person’s* identifying information with actual knowledge that the information will be used

for an unlawful purpose. The sale of information of “a specific person” is an element of a violation of section 530.5, subdivision (d)(2). Further, the sale of each victim’s personal identifying information causes severe disruption to that victim’s life. (*Valenzuela, supra*, 205 Cal.App.4th at p. 808, quoting Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2886 (2005-2006 Reg. Sess.) as amended May 26, 2006.) As a result, the moral character of identity theft is affected by the number of persons victimized.

Finally, Moreno argues: “[U]nlike any other provision in the statute, subdivision (d)(2) stands alone as a non-wobbler, and now provides for a straight felony commitment under section 1170, subdivision (h), the equivalent of a state prison sentence. Thus, the Legislature has imposed the stiffest of penalties for the sale, transfer, or conveyance of an identity profile with the requisite intent, without regard to the number of profiles sold, transferred, or conveyed during any one transaction.” In other words, she argues, since a violation of section 530.5, subdivision (d)(2), is treated more harshly than other identity theft crimes under the statute, the Legislature could not have intended to impose that harsher penalty on a per-victim basis. The premise of her argument is faulty. The Legislature has explained that the difference in statutory language was the result of a drafting error and there is no substantive difference between the penalties for violation of subdivision (d)(2) and the penalties for violation of subdivision (d)(1) of section 530.5. (Historical and Statutory Notes, 48B West’s Ann. Pen. Code (2010 ed.) foll. § 530.5, p. 399.<sup>5</sup>)

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<sup>5</sup>The Majority Assembly Leader wrote a letter to the Chief Clerk of the Assembly, which was published in the Assembly Daily Journal for the 2005-2006 Regular Session. The letter provided, in relevant part: ““Because of a drafting error in the last set of amendments (August 28, 2006), the description of the alternate felony-misdemeanor in paragraph (1) of subdivision (d) is different than the description in paragraph (2) of the subdivision. In particular, a specific reference to the alternative of a sentence to the county jail was inadvertently omitted in paragraph (2). The bill is not intended to create a substantive difference in the penalties applicable to a conviction for the crime defined in paragraph (1) of subdivision (d) as compared to the crime defined in paragraph (2). [¶] Penal Code Section 18 states that where an offense is punishable by a fine or a sentence

In sum, the statutory language and the legislative history support the conclusion that each sale of a specific person's personal identifying information is a separate violation of section 530.5, subdivision (d), even if the information for multiple victims is sold in one transaction. We reject Moreno's claim that she is guilty of only two counts of sale of personal identifying information.

## ***II. Multiple punishments***

In the alternative, Moreno claims that, under section 654, she should only be punished twice, once for the transaction of March 10, 2011, and once for the transaction of March 16, 2011.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 does not expressly bar multiple punishments when an act gives rise to more than one violation of a single provision of law, as is the case here. Nonetheless, in *Neal v. State* (1960) 55 Cal.2d 11, 18, footnote 1, our Supreme Court recognized that section 654 would apply where a defendant's act gives rise to multiple violations of a single Penal Code section. Recently, in *People v. Correa* (2012) 54 Cal.4th 331, 340 (*Correa*), the court disapproved *Neal*, holding, "Both the language and purpose of section 654 counsel against applying it to bar multiple punishment for violations of the *same* provision of law."

In response to Moreno's claim, the Attorney General relies on *Correa* for the proposition that section 654 simply does not apply to Moreno's multiple violations of the same provision of law, section 530.5, subdivision (d). But, as Moreno points out, the

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to prison, the "crime may be punishable by imprisonment in the county jail or by a fine, or by both." This is essentially the penalty prescribed in paragraph (2) of subdivision (d) of Section 530.5, as amended by AB 2886. By operation of law, and consistent with the intent and purpose of AB 2886, paragraph (2) of subdivision (d) of Penal Code Section 530.5, as amended by AB 2886, defines an alternate felony-misdemeanor."

holding of *Correa* applies prospectively only. (*Correa, supra*, 54 Cal.4th at pp. 344-345.) We agree with Moreno that the holding of *Correa* does not apply to her identity theft crimes because she committed them in 2011, more than a year before the *Correa* decision came out. (See *id.* at p. 345 [ex post facto cause barred applying new rule to defendant].)

This does not mean, however, we accept Moreno’s claim. Courts have long held that section 654 does not apply to crimes of violence against multiple victims. (*People v. Oates* (2004) 32 Cal.4th 1048, 1063.) “The reason is that ‘[a] defendant who commits an act of violence with intent to harm more than one person or by means likely to cause harm to several persons is more culpable than a defendant who harms only one person.’” (*Correa, supra*, 54 Cal.4th at p. 341, quoting *People v. Oates, supra*, at p. 1063.) On the other hand, where “offenses arising out of the same transaction are not crimes of violence but involve crimes against property interests of several persons, [the Supreme C]ourt has recognized that only single punishment is permissible.” (*People v. Bauer* (1969) 1 Cal.3d 368, 378.) Thus, for example, “a defendant who robs a jewelry store in the presence of two salespersons is guilty of and may be punished for two robberies, while a defendant who enters a residence and takes property belonging to two individuals may be punished for only a single burglary.” (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.)

Moreno argues that her offenses violate property rights only. We disagree. As we have discussed above, identity theft crime is a unique crime against the individual, not simply a property crime. The Legislature has observed that the harm suffered by an identity theft victim goes “well beyond the actual property obtained,” often severely disrupting the victim’s life. (*Valenzuela, supra*, 205 Cal.App.4th at p. 808.) The damage to an identity theft victim’s credit may be very difficult to repair, and a victim cannot simply replace his or her name, date of birth, Social Security number, or address. (*Id.* at pp. 807-808.) For these reasons, we conclude that a defendant who commits identity theft against more than one person is more culpable than a defendant who commits identity

theft against only one person, and, consequently, section 654 does not apply to violations of section 530.5 against multiple victims.

In light of our conclusion that multiple punishments are permissible when there are multiple identity theft victims, we also reject Moreno's claim that the trial court erred by imposing concurrent terms for counts 3 and 7.

***III. Correcting the abstract of judgment***

The parties agree that Moreno was entitled to the one-for-one local conduct credit rate for the time served before sentencing. They also agree that she spent 141 days in custody and is therefore entitled to 141 days' local conduct credit. In the abstract of judgment, however, the court awarded Moreno 140 days' local conduct credit. We order the court to amend the abstract of judgment to award Moreno 141 days' local conduct credit.

**DISPOSITION**

The superior court shall modify the abstract of judgment to reflect that Moreno earned 141 days' local conduct credit and forward the amended abstract to the appropriate prison authorities. The judgment otherwise is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Levy, J.

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Cornell, J.